UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) JUDGMENT

Pursuant to the Order of the Court adopting in part and rejecting in part the findings, conclusions, and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the petition for Writ of Habeas Corpus is DENIED.

DATED: May 7, 1991

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) ORDER ADOPTING IN PART AND REJECTING IN PART REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE, AND DENYING WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. §636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein, and the attached Reports and Recommendations of the United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a de novo determination of those portions of the Report and Recommendation to which objection has been made, the Court adopts in part and rejects in part the findings and conclusions contained therein, as follows:

I. Preliminary matters.

The Court concurs with and adopts the Magistrate Judge's statement of preliminary matters, Petitioner's Contentions, and Background (Report and Recommendation, pages 1-6).

II. Effect of State Reviewing Court's Findings.

The Court concurs with and adopts the Magistrate Judge's statements in his Final Report and Recommendation (pages 2-3) rejecting Respondent's contention that the state reviewing court's finding of no coercion is binding on Petitioner. The state court finding was a mixture of law and fact, and is not binding on this Court.

Although the state appellate court's conclusion might ordinarily be entitled to great weight, that rule will not be applied here. In its opinion, the state appellate court duly referred to the two instances of jury polling which occurred, but made only

passing reference to what the judge said to the jury after the polls. As correctly noted by the Magistrate Judge, it is the polling, together with the judge's comments afterward, that raise the question of potential coercion. The failure of the state reviewing court to more fully quote and evaluate those comments makes the state court's conclusion of limited value of this Court.

III. Potential Polling Coercion.

The Court concurs with the Magistrate Judge that, under present interpretation of Supreme Court cases, per se reversal is not required if a state court jury is polled on how they stand. Instead, the polling and inquiry or instructions of the judge must be viewed in light of their full context, and not in isolation, to determine if there was coercion in light of all the circumstances. Locks v. Sumner, 703 F.2d 403, 406-407 (9th Cir. 1983).

The Magistrate Judge has carefully quoted

the full context of the polling and judge's remarks, and has correctly stated the circumstances surrounding those events. The Court concurs with and adopts that statement of events.

Based upon those events, the Magistrate Judge concluded: "Given the context of the court's remarks, `substantial movement' that was `important to him' can only reasonably be interpreted in the sense that the movement should continue in the same direction toward unanimity" (Report and Recommendations, page 10, lines 8-11). Upon reviewing the entire context of the polling and judge's remarks, this Court cannot concur with that conclusion.

In this Court's view, the effect of the judge's questions and remarks was to learn in a neutral way from the jury if further deliberations would be of use to them. From the change in votes, the judge ascertained that the passage of time and further deliberations had led to changes in position.

Such changes are a normal part of the jury deliberation process. The comment that "substantial movement" was "important to him" was merely the judge's confirmation that fruitful deliberation was still going on.

In sending them back to "finish the rest of today and see where we are at that point in time, "this Court finds no coercion on the last juror to cave in. If anything, the minority juror would have known that he or she was <u>not</u> under pressure, because the case would likely end in a hung jury if the deadlock continued for a few more hours.

Considering all the circumstances, the Court must conclude there is no showing that the combination of jury polling and judge's comments coerced the jury or deprived Petitioner of a constitutional right. Accordingly, IT IS ORDERED that the Writ of Habeas Corpus Petition filed herein is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the

Reports and Recommendations and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 7, 1991.

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GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Final Report and Recommendation and the attached Report and Recommendation are submitted pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On March 13, 1991, the Clerk filed Notice of Filing of Magistrate Judge's Report and Recommendation and the Lodging of Proposed Judgment, which was served on the parties together with copies of said Report and Recommendation.

Respondent has timely filed his objections to the Report and Recommendation. The Magistrate Judge has carefully read and considered the objections, but he is not persuaded to modify his recommendation in any respect.

Respondent's objections can be condensed into one assertion; that the factual findings of the state reviewing court are binding against Petitioner.

In a habeas review, the federal court must presume that the state appellate's court factual findings are correct unless one of seven circumstances provided for in 28 U.S.C. §2254(d) is present or if the state court finding is not fairly supported by the record. Sumner v. Mata, 455 U.S. 591, 592, 102 S.Ct. 1303, 1304, 71 L.Ed.2d 480 (1982) (per curiam). Section 2254(d) applies only to questions of "`basic, primary, or historical fac[t].'" Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed. 2d

674 (1984) (quoting Townsend v. Sain, 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963)). The presumption does not apply to a state court's determination of mixed questions of fact and law. Reiger v. Christensen, 789 F.2d 1425, 1428-29 (9th Cir. 1986). A legal conclusion, such as whether a confession was voluntary, is not entitled to a presumption of correctness. Miller v. Fenton, 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985).

Respondent argues that a finding of coercion is necessarily a factual finding and, as such, the presumption in §2254 must apply. No authority for this proposition is presented by Respondent. Respondent likens the case at bar to Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed. 2d 847 (1984). In Patton, supra, the Court found that the §2254 presumption applied to a trial court's finding that particular jurors were impartial. In overturning an appellate court finding that

the issue was a mixed question of fact and law, the Court determined that the question was "plainly one of historical fact." Id. at 1036, 104 S.Ct. at 2891, 81 L.Ed.2d 847. However, the determination of impartiality by the trial court in Patton, supra, depended on its observation of the voir dire proceedings and its evaluation of each juror's credibility. Id. at 1033-39, 104 S.Ct. at 2892-93, 81 L.Ed.2d 847. These factual evaluations were the foundation for its finding of impartiality.

In the case at bar, no factual findings underpin the issue of coercion. The state appellate court was presented with a transcript reflecting the trial court's proceedings. From that, it reached the legal conclusion that coercion did not exist. The finding was not factual, but rather was comprised of mixed facts and law. The §2254 presumption does not apply in such cases.

In this due process analysis, the Court

has given the conclusion of the state appellate court great weight. See Culombe v. Connecticut, 367 U.S. 568, 605, 81 S.Ct. 1860, 1880, 6 L.Ed.2d 1037 (1961) (opinion of Frankfurter, J.). Nonetheless, in applying federal constitutional prescriptions, as it must, the court finds that the type of polling used combined with the supplemental jury instructions were coercive. See Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 550, 98 L.Ed.2d 568 (1988). The distinction between this unacceptable polling and other, possibly more appropriate types is clear. In the case at bar, the judge polled the jury on the merits, albeit he did not question them on which direction they were favoring. Concurrently, he made encouraging statements indicating that movement in one direction was important to him[1/] and due to the movement

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1. The foreperson noted that "there has been some movement in one direction" and the judge affirmatively responded, saying, "[o]kay. Well that's what's important to

more deliberation may be fruitful.[2/]

IT IS THEREFORE THE FINAL RECOMMENDATION OF THE MAGISTRATE JUDGE that an Order be issued by the Court (1) approving these Reports and Recommendations, and (2) GRANTING the Writ of Habeas Corpus and, (3) ordering Petitioner released from custody arising from his conviction, in San Bernardino Superior Court, Case No. OCR-13455 on November 7, 1988 and the sentence imposed on November 16, 1988, unless the Petitioner is granted a new trial within 60 days from the date judgment is entered herein.

Dated: 4/8/91

RONALD W. ROSE
UNITED STATES MAGISTRATE JUDGE

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me..." (RT, 440).

2. The judge told the jury that "[d]ue to the fact that we have had that type of [substantial] movement, I would request, then, to finish the rest of today..." (RT, 449).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

Petitioner, represented by counsel, commenced this action on June 5, 1990 by filing a Petition for Writ of Habeas Corpus by a Person in State Custody. Both a Return and Traverse have been timely filed. Petitioner is incarcerated in the California Correctional Training Facility at Soledad, California.

Petitioner was convicted in the San Bernardino County Superior Court on November 7, 1988 of attempted murder (Cal. Penal Code §§664/187), use of a firearm (Cal. Penal Code §12022.5) and infliction of great bodily injury (Cal. Penal Code §12022.7). The court sentenced Petitioner to ten years. (Petition 3).

Petitioner filed a direct appeal to the California Court of Appeals, Fourth Appellate District, which affirmed the conviction on December 8, 1989. He then petitioned the California Supreme Court for review of the issue presented in the case at bar. The petition was denied on March 21, 1990. Petitioner has, therefore, pursued and exhausted his state remedies. See Roman v. Estelle, 917 F.2d 1505 (9th Cir. 1990).

PETITIONER'S CONTENTIONS

Petitioner alleges that the trial court judge committed constitutional error by inquiring into the numerical breakdown of the

jury votes and requiring continued deliberation after they had announced that they were deadlocked.

BACKGROUND

The jury began deliberation on the morning of November 3, 1988. At 4:00 that afternoon the trial court judge received a note, signed by the jury's foreman stating, "[w]e are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." (Reporter's Transcript [hereafter RT] 347). The judge consulted with counsel, outside the presence of the jury, and defendant's counsel offered that in his experience, "[i]n a case like this with this type of emotions and feelings, if they're deadlocked now, they're rarely going to change." (RT 438).

The jury was then allowed in and the court quizzed the foreman about the votes:

The Court: Without telling me which direction, just numerically,

how did it start, and what was it on the last?

The Foreman: [I will] Try to tell you numerically without [indicating] either way. To the best of my recollection, it started out about maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one.

* * *

The Court: All right. So you did have -- how about in between, nine-two and one and then nine-three, has there been movement one way or the other.

The Foreman: Nine-one-two, I would say at this point. And yes, there has been some movement in one direction.

The Court: Okay. Well, that's what's important to me because of

the nature of the type of case. I want to find out that there has been movement. (RT 440) (Emphasis added).

The court then allowed the jury to leave for a three day weekend. The jury returned on Monday morning, November 7, 1988. Deliberations resumed and at 2:03 that afternoon, the court received a second note, "[w]e are in an impasse and request further direction." (RT 447). In response, the judge decided to "bring the jurors out, [to] see if there's been any substantial movement at all." (RT 447-48). The following then occurred:

> The Court: Okay. Now last Friday I inquired of you as to whether or not there had been any movement by the jury. So I'll ask you that same question again with the understanding, all I want is numbers, not which direction that you're at. How many votes have you

taken since last Friday?

The Foreman: Two or three. Two.

The Court: Two more?

The Foreman: Uh-huh

The Court: What's the latest?

The Foreman: Eleven-one

The Court: So there has been, then, substantial movement since the last time.

The Foreman: Yes.

The Court: All right. Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time. All right? Okay.

(RT 448-49). (Emphasis added).

Defense counsel then approached the bench and, outside the presence of the jury, told the court that he thought the proper inquiry was to ask the jury whether they felt that further deliberation would cause a change in

their position. He explained his rationale by noting:

> Because, just for [sic] hypothetically, if there's one person in there that's for not guilty, it's putting them on a tremendous amount of pressure, and I don't think they should be subjected to that pressure. If that person is firm in their verdict, we're not getting deliberations. We're just getting pressure.

(RT 449-50).

The Court took note of defense counsel's comments and stood firm in allowing the continued deliberation because there had been "substantial movement since Friday... [and two hours of deliberation] is not undue pressure on anyone, in my estimation." (RT 450). Two hours later, the jury returned a guilty verdict.

DISCUSSION

Petitioner argues that the trial judge's polling and supplemental statements unfairly coerced the jury into reaching a verdict and thus he was deprived of due process. Courts have long struggled with the propriety of polling jurors before the verdict is rendered and various standards have been suggested. See Annot., 77 A.L.R.3d 769 (1977).

This Court examines the polling and surrounding events to determine whether, under the totality of circumstances, the result was coercive. The main factors considered are the type of polling used and the coercive nature of any supplemental jury instruction. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 550, 98 L.Ed.2d 568 (1988); Jenkins v. United States, 380 U.S. 445, 446, 85 S.Ct. 1059, 1060, 13 L.Ed.2d 957 (1965) (per curiam). Although the Court does not evaluate the instructions in a vacuum, the analysis focuses on them to determine whether they

infected the entire trial so that the resulting conviction violates due process. Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

Respondent relies on Lowenfield, supra, for the proposition that per se reversal is no longer required in cases such as the one at bar. The Court agrees. The analysis, however, cannot end there. In fact, the Lowenfield court notes that the jury polling, especially when combined with improper jury instructions, presents the potential danger of coercion. Id at 239-40, 108 S.Ct. at 552. The Court held that the polling in Lowenfield was constitutional. The polling used in that case, however, is distinguishable from the type in the case at bar. Id. As Petitioner points out, the Lowenfield trial judge's inquiry was not on the merits. Rather, the judge specifically asked the jurors if they felt that any more deliberations would enable them to arrive at a verdict. Id. at 237, 108

S.Ct. at 549. This is in stark contrast to the polling that occurred in the instant case. Here the trial judge asked specifically for the number of votes taken and the results of each voting event.[1/] Defense counsel recommended the Lowenfield approach to the polling of the jury, that is, to center the inquiry on whether they felt more deliberation would be fruitful; the judge refused the suggestion. (RT 449-50).

There is clear distinction between the two alternative polling techniques. When polled on the benefit of further deliberations, the fact that people disclose their view has no effect on their upcoming vote on the merits. People in the majority on the merits are no more likely to conclude that further deliberation would be fruitful than people in the minority, and vice versa.

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1. The judge specifically asked the jury to refrain from telling him the direction, guilty or not guilty, that the vote leaned.

Repeated polling on the merits has a dramatically different effect. The Supreme Court dealt with identical type polling in Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926), the case that the Lowenfield decision ultimately narrowed. The Court noted that merit polling, without more, generally is coercive.

> It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Id. at 450, 47 S.Ct. at 136.

The fact that the judge did not discover or request the foreman to quantify the number of jurors in the majority versus the number in the minority regarding guilt or non-guilt is of no consequence. Id. at 449, 47 S.Ct. at 137.

135. Merit polling, standing alone, supports a finding of coercion.

An additional indication of coercion is provided by counsels' agreement to accept the jury's second stated impasse as an indication that it was hopelessly deadlocked.

Notwithstanding this agreement, the judge decided to bring the jurors out for the expressed purpose of determining if there had been any substantial movement. (RT 447-48). This must be contrasted with the Lowenfield analysis, in which the Court noted that defense counsel neither objected to the polls nor the supplemental instruction, lending credence to the decision that coercion did not exist.[2/] Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552.

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2. In the Lowenfield decision the Court implied that the likelihood of potential coercion would have been buttressed had defense counsel objected "on the spot". Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552. In the case at bar, defense counsel did object to the type polling being utilized and suggested an alternative.

Next, the Court analyzes the judge's comments and instructions themselves. His initial and proper instruction to the jurors before they began their deliberation was, in pertinent part, as follows:

> Each of you must decide the case for yourself but should do so only after a discussion of the evidence and the instructions with the other jurors.
>
> You should not hesitate to change an opinion if you are convinced it is erroneous. However, you <u>should not be influenced to decide any question in a particular way because a majority of the jurors or any of them favor such a decision</u>.

(RT 426-27) (Emphasis added).

Nonetheless, after the jury reached their first impasse, the judge determined that the voting was progressing, seven-five,

eight-four, nine-three, and told the jury to return to deliberate because such movement was important to him. (RT 440). After the jury reached a second and final impasse, and the poll was eleven-one, the judge specifically asked if there had been substantial movement in the vote. Given the context of the court's remarks, "substantial movement" that was "important to him" can only reasonably be interpreted in the sense that the movement should continue in the same direction toward unanimity. The coercion on the sole juror is apparent. The judge desired a verdict, the jury was moving in that direction, and then, the judge allowed the majority two more hours to convince the lone holdout; it was simply a matter of time.

As intended, the jury returned with its verdict quickly after restarting deliberation; this creates a strong inference of coercion. United States v. United States Gypsum Co., 438 U.S. 422, 462, 98 S.Ct. 2864, 2886, 57 L.Ed.2d

854 (1978).

CONCLUSION

After thoroughly reviewing the entire file and in considering all of the events in context, the Magistrate Judge concludes that the jury polling, coupled with the judge's supplemental instruction, was sufficiently coercive to violate Petitioner's due process right to a fair trial.

IT IS THEREFORE RECOMMENDED that the Court issue an Order (1) approving the adopting of this Report and Recommendation as the findings of fact and conclusions of law herein, (2) GRANTING the Writ of Habeas Corpus and, (3) ordering Petitioner released from custody arising from his conviction, in San Bernardino Superior Court, Case No. OCR-13455 on November 7, 1988 and the sentence imposed on November 16, 1988, unless the Petitioner is granted a new trial within 60 days from the date judgment is entered herein.

Dated: March 11, 1991

RONALD W. ROSE
UNITED STATES MAGISTRATE JUDGE